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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 228

WILLIAM R. BROWN,

Petitioner,

vs.

VINCENT O'BRIEN,

Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

PETITION FOR WRIT OF CERTIORARI AND BRIEF IN SUPPORT THEREOF.

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ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

PETITION FOR WRIT OF CERTIORARI.

To the Honorable the Chief Justice and Associate Justices of the Supreme Court:

The petitioner, William R. Brown, respectfully prays that a writ of certiorari may issue to review the decision of the Supreme Court of Illinois entered in the above entitled cause on March 14, 1949 which affirmed the judgment of the Superior Court of Cook County, Illinois.

I.

Statement of the Matter Involved.

Respondent, Vincent O'Brien, a lawyer since 1922, (R.18), sued petitioner, William R. Brown, in the Superior Court of Cook County to recover three times the amount of an

alleged overcharge for rent exacted by petitioner, as authorized by the Emergency Price Control Act and amendments thereto, and attorney fees. (50 U. S. C. A. App. sec. 925 (e)). (R. 1,2) After the evidence was concluded the judge directed the jury to find the petitioner had demanded and received $1,320 rent in violation of such statute. (R. 35). The Court, heard evidence and assessed the damages, entered judgment against petitioner for the amount of $3,960, and an additional amount of $500 fixed by the court as reasonable attorney fees. (R. 3, 13) The petitioner throughout the pleading and trial claimed that the Emergency Price Control Act was unconstitutional, and raised other constitutional questions.

Petitioner leased to respondent a residence property in Chicago for the term October 1, 1941, to September 30, 1943. In like manner the premises were let to respondent by a second lease for the two-year term October 1, 1943, to September 30, 1945. The provision for rent was, in both leases, identical:

> "First. Lessee shall pay to lessor, at the office of lessor, or designated agent, the rent per month of One Hundred twenty-five dollars ($125.00) in advance, for the term created by this lease."

Respondent withheld possession (R. 29) of the premises after notice from his landlord in August, 1945, that the lease would not be renewed that he was going to remove the property from the rental market. (R. 20, 21.)

He stayed in possession until May 20, 1946, tendering to defendant the sum of $125 for each month beyond the end of the term of the second lease through April, 1946. These tenders were refused. (R. 19, 20.)

On January 24, 1946 the petitioner commenced an action in the Municipal Court of Chicago against the respondent.

This action was on a covenant in the lease for the payment of liquidated damages of $10 per day for each day the respondent withheld possession of the premises from petitioner after the expiration of the lease. The Municipal Court dismissed the action and petitioner appealed. (R. 22, 23.)

On November 22, 1946 while the appeal was pending respondent wrote a letter to the petitioner in which he said:

> "You will recall that the written lease between us covering that property was for a term which expired on September 30, 1945, at a rental of $125.00 per month. That lease provides that at the termination thereof I shall yield possession of that property to you and failing so to do shall pay as liquidated damages the sum of $10.00 per day. I surrendered possession of that property to you on May 20, 1946 i.e. 232 days after the expiration of that lease. You have contended that at the time of the expiration of that lease you wished to remove that property from the rental market and at that time I was required to surrender possession of the property to you. You further contend that under the provisions of that lease I became and am liable to pay you $2320.00 being the product of $10.00 per day for the 232 days in question. I hereby tender to you $2320 in United States Currency, being as hereinbefore set forth the amount of your claim."

The payment thus tendered was accepted by petitioner (R. 20, 21).

The respondent decided to pay petitioner's claim and sue him under the statute for triple damages and attorneys fees (R. 10, 26).

The Appellate Court held that the petitioner having received the liquidated damages of $10.00 per day claimed in the appeal dismissed the appeal (R. 24). *Brown* v. *O'Brien*, 331 Ill. App. 23.

On January 10, 1947 the present action was instituted

for three times the alleged overpayment of rent of $1320.00 and for reasonable attorneys fees as provided in the Emergency Price Control Act as amended, (50 U.S.C.A. App. Sec. 925 (e).) The overcharge was calculated as being the difference between the $2320.00 paid as liquidated damages and the alleged maximum rent of $1000 for eight months October 1945 to May 1946 (R. 1, 2).

The answer of petitioner raised the defense that the act was unconstitutional as it deprived petitioner of trial by jury contrary to the Constitution of the United States and the State of Illinois; and that respondent was estopped from claiming the payment of liquidated damages for withholding possession of the premises was rent; that the maximum rent was $3000 for a two year term; that respondent was not an occupant of the premises on November 22, 1946 when the $2320 was paid (R. 2, 3). The petitioner amended his answer to allege that respondent made the payment of $2320 for the purpose of enriching himself by bringing this suit (R. 8).

The trial court directed the jury to return the following verdict:

> "We, the jury, find that the defendant William R. Brown demanded and received from Vincent O'Brien, the plaintiff, an overcharge of rent in the amount of $1320.00 in violation of the Emergency Price Control Act of 1942, as amended" (R. 35).

The trial court heard evidence and argument concerning attorneys' fees and damages and allowed $500 as attorneys' fees and assessed the damages at $3960.00 (R. 11, 12).

The State Supreme Court of Illinois in affirming the judgment held that the constitutional right of trial by jury is not impaired when the amount of damages is found by a court after a jury or a pleading has established a factual basis out of which damages arise (R. 66).

The State Supreme Court also held that Congress has the power to regulate procedure in State Courts in the enforcement of Federal Laws (R. 65).

The State Supreme Court also held that the sum of $2320 paid to the owner of the premises as liquidated damages for withholding possession of the premises was a payment of rent (R. 63, 64).

The State Supreme Court also held that The Emergency Price Control Act, and regulations thereunder were intended to "freeze" the occupancy of premises and tenants could lawfully occupy premises so long as they paid rent (R. 64).

The Supreme Court dismissed all other points urged without specific decision (R. 67). These points are discussed at length in the dissenting opinion holding that a payment made six months after surrender of the premises cannot be brought within the ambiguous phrase of the act "in connection with" the use and occupation of the premises (R. 71).

Another point dismissed without discussion in the majority opinion was petitioner's claim that payment made by respondent, a lawyer, for purpose of enriching himself by bringing suit for triple damages were not within the act. In the dissenting opinion it is said:

> "To deny recovery in this type of case does not mean that violations will go unpunished. Adequate means of enforcement are afforded to the Administrator without the necessity of converting the provision into an instrument of private aggrandizement" (R. 71).

II.

Jurisdictional Statement.

On March 24, 1949 the Supreme Court of Illinois, the highest court in the State of Illinois in which a decision could be had, filed its opinion affirming a judgment of the Superior Court of Cook County and on May 11, 1949 denied a petition for a rehearing (R. 58, 89).

This petition for writ of certiorari is presented within three months of May 11, 1949 having been filed August 10, 1949.

The jurisdiction of this court is invoked under Title 28 United States Code, and Judicial Procedure Section 1257, Paragraph 3, Public Law 773, 80th Congress, 67, effective September 1, 1948.

The validity of the Emergency Price Control Act of 1942, as amended, is drawn in question as denying the right of trial by jury in an action at common law in the state courts.

The judgment is a decision in which rights, privileges and immunities is specially set up or claimed under the Constitution of the United States, Seventh Amendment, and under Emergency Price Control Act of 1942, as amended, a Statute of the United States. The Emergency Price Control Act of 1942, as amended, 50 U.S.C.A. App. 904 (d), 925 (e) and 942 (g) Chap. 26 Sec. 4 (d) and 205 (e) 56 Stat. 23 as amended by Sec. 108 (b) Chap. 325, 58 Stat. 640, approved June 30, 1944, and Sec. 302 (g) 56 Stat. 36.

III.

Questions Presented.

1. Whether in suits at common law the right of trial by jury preserved by the Seventh Amendment to the Constitution of the United States includes the assessments of damages by the jury?

2. Whether Congress can regulate the practice in the State Courts in suits at common law based on a Federal Statute so as to require the damages to be assessed by the Court and not by a jury?

3. Whether Congress can regulate the practice in the State Courts in suits at common law based on a Federal Statute so as to authorize the State Courts to enter judgment for an amount in excess of the verdict returned by the jury?

4. Whether the Emergency Price Control Act of 1942, as amended, gave respondent after notice by petitioner that he would not offer the premises for rent after the expiration of his lease, a right to withhold possession of the premises from petitioner?

5. Whether respondent, a lawyer, can six months after surrender of possession of the premises make a payment of liquidated damages for withholding possession of the premises after the expiration of his lease for the purpose of enriching himself by a suit at common law for treble damages and attorney fees maintain an action under the Emergency Price Control Act of 1942, as amended?

6. Whether respondent who has been notified by petitioner prior to the expiration of his lease that the premises would not be offered for rent after the end of the lease can maintain an action under the Emergency Price Control

Act of 1942, as amended, where he withheld possession of the premises from petitioner for 232 days after the expiration of the lease and six months after surrendering possession of the premises to petitioner paid petitioner $2320 as liquidated damages of $10 per day for withholding possession of the premises after the expiration of his lease?

IV.

Reasons Relied Upon for Allowance of the Writ.

1. The state court held that the constitutional right of trial by jury is not impaired when the amount of damages is found by a court after a jury or a pleading has established a factual basis out of which damages arise.

This raises a very important question of a right or privilege set up under the Seventh Amendment of the Constitution.

In *Dimick* v. *Scheidt,* 293 U. S. 474, 486, 79 L. Ed. 603, 611 this court held that the determination of liability and the assessment of damages are both questions of fact that must be submitted to the jury and not decided by the court.

The state court's construction of the right of trial by jury is in conflict with the decision of this court in *Dimick* v. *Scheidt, supra.*

2. The state court held that Congress could regulate the practice in state courts in actions at common law based on a Federal Statute so as to require the damages to be assessed by the court and not by a jury.

This is question of great importance in the preservation of the right of trial by jury secured by the Constitution not theretofore decided by this court.

The decision is not in accord with applicable decisions

of this court, holding that power, jurisdiction of state courts is governed by State Constitution and Statutes.

Test & Fleming v. *Katt*, 330 U. S. 386, 91 L. Ed. 776.

Caldarola v. *Eckert*, 332 U. S. 155, 91 L. Ed. 1968.

It is also inconsistent with Art. III Sec. 1 Federal Constitution as construed by this court in *Federal Power Com.* v. *Pacific P. & L. Co.*, 307 U. S. 156, 83 L. Ed. 1180.

3. The state court held that Congress could regulate the practice in the state courts in actions at common law so as to authorize the state court to enter judgment in an amount in excess of the verdict of the jury.

This is in direct conflict with the decision of this court in *Dimick* v. *Scheidt*, 293 U. S. 474, 482, 79 L. Ed. 603, that the Constitution forbids the court increase the damages awarded by the jury.

4. The state court held that respondent could lawfully withhold possession of the premises after the expiration of his lease and after notice by petitioner that he would not offer the premises for rent.

This decision denied petitioner the right to discontinue rental of the premises after the expiration of the lease. This is in clear conflict with the decision of this court in *Bowles* v. *Willingham*, 321 U. S. 503, 517, 88 L. Ed. 892, 905.

5. Respondent, a lawyer, made the payment six months after surrender of possession of the premises for the purpose of bringing this suit for treble damages and attorneys' fees.

This was a payment in the course of business, for gain or profit, and respondent could not bring an action under the statute.

The state court's decision is in conflict with decisions of the courts in sister states in the following cases:

Trapp v. *Great A. & P. Tea Co.*, 21 N. J. Misc. 205, 32 Atl. 2d 717.

Dunokin v. *S. W. Co-op Assn.*, 49 N. M. 69, 157 Pac. 2d 243.

Lightbody v. *Russell*, 45 N. Y. S. 2d, 15, 293 N. Y. 492.

and the dissenting opinion in this case (R. 71).

6. Respondent made the payment in question six months after he surrendered possession of the premises to petitioner. This payment cannot be said to have been "received in connection with the use or occupancy . . . of any housing accommodation".

The decision of the state court is in direct conflict with the provision of the statute. 50 U.S.C.A. App. 942 (g).

Wherefore, it is respectfully submitted that this petition for the writ of certiorari to review the judgment of the Supreme Court of Illinois should be granted.

WILLIAM R. BROWN,
Attorney for Petitioner.

BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

I.

Opinion in State Courts.

Opinion in Illinois Supreme Court. *O'Brien* v. *Brown*, 403 Ill. 183 (Adv. Sheets) (R. 58, 70).

II.

A Statement of the matter involved is incorporated in the petition and will not be repeated here.

III.

A Jurisdictional Statement is incorporated in the petition and will not be repeated here.

IV.

Constitution and Statutes involved.

Amendment VII of the Constitution:

> "In suits at common law, where the value in controversy shall exceed twenty dollars the right of trial by jury shall be preserved, and no fact tried by a jury shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Constitutional Article III, Sec. 1:

> "The judicial Power of the United States shall be vested in one Supreme Court and in such inferior Courts as the Congress may from time to time ordain and establish."

Statutes involved:

Emergency Price Control Act of 1942, Jan. 30, 1942, Ch. 26, Title I, S. 4(d), 56 Stat. 28 (50 U.S.C.A. App. 904(d)) Ch. 26 Title II, S. 205 (e) 56 Stat. 33, as amended June 30, 1944 C. 325, Title I, S. 108 (e) 58 Stat. 640 (50 U.S.C.A. 925 (e)) Ch. 26 Title III, Sec. 302 (g) 56 Stat. 36 (50 U.S.C.A. 942 (g)).

Sec. 4 (d) (50 U.S.C.A. App. 904 (d)) provides:

> "Nothing in this Act shall be construed to require any person . . . to offer any accommodations for rent."

Sec. 302(g) (50 U.S.C.A. 942 (g)) provides:

> "The term 'rent' means the consideration demanded or received in connection with the use or occupancy or the transfer of a lease of any housing accommodations."

Sec. 205 (e) (50 U.S.C.A. App. 925 (e)) provides:

> "If any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, *the person who buys* such commodity for use or consumption *other than in the course of trade or business* may, within one year from the date of the occurrence of the violation, except as hereinafter provided, bring an action against the seller on account of the overcharge. In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is greater: (1) Such amount not more than three times the amount of the overcharge, or the overcharges, upon which the action is based as the court in its discretion may determine, or (2) an amount not less than $25 nor more than $50, as the court in its discretion may determine: Provided however, That such amount shall be the amount of the overcharge or overcharges or $25, whichever is greater, if the defendant proves that the violation of the regulation, order or price schedule in question was neither willful nor the result of failure to take practicable precau-

tions against the occurrence of the violation. For the purposes of this section *the payment* or receipt *of rent* for defense-area housing accommodations *shall be deemed the buying* or selling *of a commodity*, as the case may be; and the word 'overcharge' shall mean the amount by which the consideration exceeds the applicable maximum price. *If* any person selling a commodity violates a regulation, order, or price schedule prescribing a maximum price or maximum prices, and *the buyer* either fails to institute an action under this subsection within thirty days from the date of the occurrence of the violation or *is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States* within such one year period. If such action is instituted by the Administrator, the buyer shall thereafter be barred from bringing an action for the same violation or violations. Any action under this subsection by either the buyer or the Administrator, as the case may be, may be brought in any court of competent jurisdiction. * * *"

V.

QUESTIONS PRESENTED.

The questions presented and reasons relied upon for the allowance of the writ, are incorporated in the petition and will not be repeated here. Each six questions and reasons will be discussed in the following argument.

Specification of Errors.

The Supreme Court of Illinois erred:

1. In holding that the right of trial by jury was not impaired by the court hearing evidence and assessing the damages.

2. In holding Congress had the power to regulate the practice in state courts in suits at common law so as to

require damages to be assessed by the court and not by a jury.

3. In holding that Congress can regulate the practice in state courts so as to authorize the state courts to enter judgment for an amount in excess of the verdict of the jury.

4. In holding that the Emergency Price Control Act, as amended, gave respondent a right to withhold possession of the premises after expiration of his lease and notice by petitioner that he would not offer the premises for rent.

5. In holding that respondent, a lawyer, can make a payment of liquidated damages for witholding possession of the premises six months after surrender of possession for the purpose of enriching himself by a suit at common law for treble damages and attorney's fees under the Emergency Price Control Act of 1942, as amended.

6. In holding that respondent could maintain suit under the Emergency Price Control Act as amended, for a payment made six months after he had surrendered possession of the premises.

ARGUMENT.

VI.

The right of trial by jury preserved by the Seventh Amendment of the Constitution secures to litigants the right to have the jury determine the question of liability and amount of the damages.

The trial court instructed the jury to return a verdict finding an overpayment of $1320 rent (R. 35), the trial judge heard evidence and argument and assessed the damages at $3960 and entered judgment for $3960 plus $500 attorney's fees (R. 11).

The State Supreme Court held that the right of trial by jury is not impaired when the amount of the damages are assessed by the trial judge after a jury has established the factual basis out of which damages arise (R. 66).

This is a very important question of construction of the Federal Constitution and if it stands trial judges may assess damages and enter judgment for more or less than the amount assessed by the jury or without submitting the question of damages to the jury.

The state court has decided this federal question of substance in a way probably not in accord with applicable decisions of this court. (Rule 38 (5) (a)).

In *Dimick* v. *Schiedt* (1935), 293 U. S. 474, 79 L. 603 action was brought in U. S. District Court for damages due to personal injuries due to negligent operation of an automobile on the public highway. The jury returned a verdict in favor of plaintiff for the sum of $500. Motion for new trial on ground verdict against the weight of the evidence and the damages were inadequate. District Court ordered a new trial unless defendant would consent to an increase of the damages to $1,500. Defendant consented. Circuit Court of Appeals reversed the trial court, holding that the conditional order violated the Seventh Amendment of the Federal Constitution in respect of the right of trial by jury. 70 F. 2d 558.

The Supreme Court said (p. 476):

> "In order to ascertain the scope and meaning of the Seventh Amendment, resort must be had to the appropriate rules of the common law established at the time of the adoption of that constitutional provision in 1791."

The court then reviews the English cases and then said (p. 482):

"From the foregoing and from many other English authorities which we have examined but deem it unnecessary to cite, we conclude that, while there was some practice to the contrary in respect of decreasing damages, the established practice and the rule of the common law, as it existed in England at the time of the adoption of the Constitution, forbade the court to increase the amount of damages awarded by a jury in actions such as that here under consideration."

The court then reviewed earlier cases of remittatur where damages were excessive. The court then said (p. 486):

485—H Note 2

"The controlling distinction between the power of the court and that of the jury is that the former is the power to determine the law and the latter to determine the facts. In dealing with questions like the one now under consideration, that distinction must be borne steadily in mind. Where the verdict returned by a jury is palpably and grossly inadequate or excessive, it should not be permitted to stand; but, in that event, *both parties remain entitled, as they were entitled in the first instance, to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages. Both are questions of fact.* (Emphasis supplied.) Where the verdict is excessive, the practice of substituting a remission of the excess for a new trial is not without plausible support in the view that what remains is included in the verdict along with the unlawful excess,—in that sense that it has been found by the jury,— and that the remittitur has the effect of merely lopping off an excrescence. But where the verdict is too small, an increase by the court is a bold addition of something which in no sense can be said to be included in the verdict. When, therefore, the trial court here found that the damages awarded by the jury were so inadequate as to entitle plaintiff to a new trial, how can it be held, with any semblance of reason, that that court, with the consent of the defendant only, may, by assessing an additional amount of damages, bring the constitutional right of the plaintiff

to a jury trial to an end in respect of a matter of fact which no jury has ever passed upon either explicitly or by implication? To so hold is obviously to compel the plaintiff to forego his constitutional right to the verdict of a jury and accept '*an assessment partly made by a jury which has acted improperly, and partly by a tribunal which has no power to assess.*'" (Emphasis supplied.)

VII.

Congress can not regulate the practice in state courts in suits at common law based on a federal statute so as to require the damages to be assessed by the court and not by a jury.

The Statute Sec. 205 (e) (50 U.S.C.A. 925 (e)) provides:

> "In such action, the seller shall be liable for reasonable attorney's fees and costs as determined by the court, plus whichever of the following sums is greater: (1) Such amount not more than three times the amount of the overcharge . . . upon which the action is based as the court in its discretion may determine or (2) an amount not less than $25 nor more than $50 as the court in its discretion may determine."

The state court held that Congress could regulate the practice in state courts and that this provision did not deny the right of trial by jury secured by the Seventh Amendment (R. 65).

This is a decision of a federal question of substance not theretofore determined by this court. (Rule 38 (5) (a)). This is an important question of constitutional law that should be determined and settled by this court.

We have shown under Point VI, *supra*, that this court held in *Dimick* v. *Scheidt*, 293 U. S. 474 that the determination of liability and assessment of damages is a question of fact for a jury under the Seventh Amendment.

The Seventh Amendment prohibits the reexamination of questions of fact by the trial judge in the following words:

> "No fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

Under this provision Congress could not authorize federal courts much less state courts to hear evidence and reexamine facts in jury cases for purpose of assessing damages.

It should be remembered that Congress has never regulated the practice in federal courts prior to authorizing Rules of Civil Procedure for District Courts of the United States, the federal courts following state practice, much less has Congress prior to the approval of the Price Control Act of 1942 attempted to regulate proceedings of state courts.

This presents an important question not heretofore passed upon by this court. The decision of the state court is probably in conflict with the principles laid down by this court in holding that Congress can determine the scope and jurisdiction of the federal courts. *Federal Power Com.* v. *Pacific P. & L. Co.*, 307 U. S. 156, 83 L. Ed. 1180 and the holding in *Claflin* v. *Houseman*, 93 U. S. 130, 23 L. Ed. 833; *Teste & Fleming* v. *Katt*, 330 U. S. 386, 91 L. Ed. 967; *Caldarola* v. *Eckert*, 332 U. S. 155, 158, 91 L. Ed. 1968, 1971 that powers and jurisdiction of the state courts is governed by the state constitution and statutes.

The decision of the state court is probably not in accord with Art. III, Sec. 1 of the Federal Constitution:

> "The Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

This court held in *Federal Power Com.* v. *Pacific P. & L. Co.*, 307 U. S. 156, 83 L. Ed. 1180 that Congress determines the scope and jurisdiction of the lower federal courts.

This court has never been heretofore called upon to determine this question as Congress has never before deprived citizens of the right of trial of common law actions by jury.

VIII.

Congress can not authorize the state courts to enter judgment for an amount in excess of the verdict of the jury.

The state court held that there was no error in the trial court entering judgment for damages and attorney's fees in excess of the verdict of the jury (R. 62, 70).

This decision is not in accord with applicable decision of this court. (Rule 38 (5) (a)).

In *Dimick* v. *Scheidt*, 293 U. S. 474, 482 91 L. Ed. 603 this court held:

> . . . both parties remain entitled . . . to have a jury properly determine the question of liability and the extent of the injury by an assessment of damages. Both are questions of fact."

This court reversed the above case because the court entered judgment for an amount in excess of the verdict of the jury.

This court has held that the award of exemplary damages has always been left to the jury.

Day v. *Woodworth*, 13 How. 363, 371, 14 L. Ed. 181.
Denver & Rio G. R. v. *Harris*, 122 U. S. 597, 609.

IX.

The Emergency Price Control Act of 1942, as amended, gave respondent no right to withhold possession of the premises after expiration of the lease, the end of petitioner's offer of the premises for rent.

Petitioner notified respondent that he would not offer the premises for rent after the expiration of the lease and was withdrawing the premises from the rental market (R. 20, 21).

Respondent withheld possession after the expiration of his lease for 232 days (R. 20). The state court held:

> "The Emergency Price Control Act and the regulations thereunder were designed and expressly intended to 'freeze' the occupancy of premises covered. The landlord here was in the company of thousands of others who had tenants who could lawfully occupy as long as they paid the rent" (R. 64).

This decision is in conflict with Sec. 4 (d) of the Act, 50 U.S.C.A. App. 904 (d), as decided by this court in *Bowles* v. *Willingham*, 321 U. S. 503, 517, 88 L. Ed. 892, 905 where this court said:

> "By S.4(d) of the act it provides 'nothing in this act shall be construed to require any person to sell any commodity or to offer any accommodations for rent'. There is no requirement that the apartments in question be used for purpose which bring them under the act."

X.

The act does not authorize a suit by respondent to recover money paid in the course of business for the purpose of making a profit by bringing this suit.

Respondent, a lawyer, made the payment six months after he surrendered possession of the premises for the

purpose of bringing this suit to collect treble the amount of the alleged overpayment and attorney's fees (R. 10, 26).

Judgment was entered for $3960.00 treble the alleged overpayment and $500 attorney's fees (R. 12). The State Supreme Court affirmed (R. 58, 70).

The act Sec. 205 (e) provides: (50 U.S.C.A. App. 925 (e))

> "If any person selling a commodity violates . . . a price schedule . . . the person who buys such commodity for use or consumption other than in the course of trade or business may . . . bring an action against the seller . . . For the purposes of this section the payment of rent . . . shall be deemed the buying or selling of a commodity . . . if the buyer either fails to institute an action under this subsection . . . or is not entitled for any reason to bring the action, the Administrator may institute such action on behalf of the United States."

The payment made by respondent, a lawyer, to make a profit was in the course of business.

Business has been defined in *Flint* v. *Stone Tracy Co.*, 220 U. S. 107, 171, 55 L. Ed. 389, as

> "Business is a very comprehensive term and embraces everything about which a person can be employed. Black's Law Dist. 158, citing *People ex rel. Hoyt* v. *Tax Comms.*, 23 N. Y. 242, 244: 'That which occupies the time, attention and labor of men for the purpose of a livelihood or profit.' 1 Bouvier's Law Dict., p. 273."

This being a payment made for profit was in the course of business and only the "Administrator" could bring suit "for the use of the United States" under the Act.

It is correctly said in the dissenting opinion:

> "Adequate means of enforcement are afforded to the administrator without the necessity of converting the provisions into an instrument of private aggrandizement" (R. 71).

In the following cases the courts of sister states have held that where a purchaser of a commodity in a retail store at over ceiling prices for the purpose of bringing suit under the Emergency Price Control Act could not recover.

Trapp v. *Great A. & P. Tea Co.*, 21 N. J. Misc. 205, 32 Atl. 2d 717.

Dunokin v. *S. W. Consumers Co.-op Ass'n*, 49 N. M. 69, 157 Pac. 2d 243.

This question of substance decided by the state court not theretofore determined by this court should be decided by this court.

XI.

The payment made by respondent six months after he surrendered possession of the premises was not made "in connection with the use or occupancy" of the premises and was not rent as defined in the act.

Respondent surrendered possession of the premises May 20, 1946 (R. 20) six months later on November 22, 1946 the payments of liquidated damages for withholding possession of the premises after the expiration of his lease was made (R. 20, 21).

Rent is defined in Sec. 302 (g) of the Act, (50 U.S.C.A. App. 942 (g)) as follows:

> "The term 'rent' means the consideration demanded or received in connection with the use or occupancy or the transfer of a lease of any housing accommodations."

In the dissenting opinion in the State Supreme Court it is said:

> "At the time this payment was made the plaintiff (respondent) was neither in possession nor attempting to obtain possession. He voluntarily abandoned the

premises six months before. Under the circumstances the payment cannot, consistently with the purposes of the act, be brought within the ambiguous phrase 'in connection with' the use or occupancy of housing accommodations. It has no relation with the applicable statutory objective to 'protect persons with relatively fixed and limited incomes . . . from undue impairment of their standard of living'" (R. 71).

This presents a question of substance not theretofore determined by this court and should be decided by this court.

Conclusion.

For these reasons Petitioner urges that the Writ of Certiorari prayed in the Petition be granted.

WILLIAM R. BROWN,
Attorney-Petitioner.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1949.

No. 228

WILLIAM R. BROWN,

Petitioner,

vs.

VINCENT O'BRIEN,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

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BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI.

MAY IT PLEASE THE COURT:

OPINION BELOW.

The opinion of the Supreme Court of Illinois appears in the record at page 58. It is reported as *O'Brien* v. *Brown*, 403 Ill. 183.

STATEMENT OF THE CASE.

Many material facts which led to the overpayment in question are omitted in petitioner's statement of the case.

Respondent and his family had occupied the premises in question as their home, since September, 1941, under the leases mentioned in the petition (R. 18), the last of which

expired by its terms September 30, 1945 (R. 30). These leases called for a rent of $125 per month.

In August of 1945 petitioner announced that he would not renew the lease since he intended to offer the premises for sale (R. 25). In remitting the rent for September, 1945, respondent wrote petitioner as follows:

> "Enclosed is check for the September rent. I understood in our conversation, before you left for your vacation, that you do not wish to renew the lease. It will take us sometime to decide what to do and, in the meantime, rent for October will be due. Since acceptance of the October rent would, in the absence of some understanding to the contrary, amount to a renewal of the lease, it may be understood that no renewal will thereby be effected, but that any possession after September 30th shall be on a month to month basis. I should appreciate it if you will confirm that understanding if it meets with your approval." (R. 25.)

Petitioner, however, insisted upon possession by September 30, 1945, and, as stated in his petition, thereafter refused all tenders of rent for the months of October, 1945 to May, 1946, which respondent made to avoid any legal basis for eviction. Each tender was accompanied by a letter from respondent stating that respondent's retention of possession "was pursuant to O. P. A. Regulations and the law as related thereto as would be your acceptance of the rent above mentioned" (R. 19).

During September of 1945, respondent succeeded in finding and buying a home but could not move in because the Office of Price Administration permitted a tenant then in possession to remain until April 30, 1946 (R. 26).

At all times in question, there were in effect and operative in Chicago, Illinois, Sections 6(a) and 6(b) of Rent Regulations for Housing, promulgated by the Administrator pursuant to the authority of the Emergency Price Control Act. Their validity has not been questioned in the

case at bar and has been upheld by the Emergency Court of Appeals.

Section 6(a) prohibited the removal or eviction of a tenant notwithstanding the expiration of his lease so long as he paid the rent to which his landlord was entitled, except in certain specified instances not here involved. Section 6(b) provided that before proceeding in any other case the landlord must obtain the Administrator's approval by receiving an O. P. A. certificate.

There is no evidence that petitioner ever procured a purchaser or of any occurrence which would entitle him to such a certificate. Admittedly, he never at any time, for any reason, procured such certificate. He did file a petition therefor which he withdrew later before O. P. A. had acted thereon (R. 22).

In defiance of the Regulations, petitioner commenced an aggressive series of actions to compel respondent to move and to pay rent in excess of the ceiling for his continued and lawful use and occupancy of the premises. Among such actions, were two forcible entry and detainer suits brought by petitioner in the Municipal Court of Chicago. In the first, the court entered judgment against petitioner and in the second petitioner took a non suit (R. 22).

At the same time, petitioner had pending a separate suit for the recovery of "liquidated damages" on account of respondent's allegedly wrongful retention of possession (R. 22). That suit was based on a clause of the lease providing for liquidated damages of $10 a day for withholding possession after expiration thereof. When, in that suit, the trial court ruled against petitioner on the ground that Federal law nullified the lease provision declared upon, as calling for rent in excess of the ceiling, petitioner persisted in his demand by perfecting an appeal, and by filing the printed record and his brief (R. 23).

In connection with these proceedings, respondent was compelled to and did retain counsel, and had been and was being subjected to substantial expense for reporters and attorneys' fees, printing bills and other expenses of suit, for which reimbursement could not be had in those proceedings. In an effort to avoid further expense and to have the demands of his landlord determined in a forum in which reimbursement might be had, respondent, before his briefs were due on said appeal, paid petitioner's claim under protest, and in so doing told petitioner that he did not thereby admit its validity but on the contrary reserved all rights available to him under the Emergency Price Control Act and the Price Control Extension Act (R. 21, 26). This is shown by the following statement in respondent's letter accompanying the payment, omitted from the portion quoted by petitioner at page 3 of his petition:

> "In making this tender I do not admit the validity or legality of your claim. I reserve any and all rights which I may have. More specifically and without limiting the foregoing, I reserve any and all rights which I may have by virtue of this tender and payment under the Emergency Price Control Act of 1942, as amended, and the Price Control Extension Act of 1946."

Thereafter the appeal was dismissed as moot on respondent's motion, but only after he was obliged to file his brief and to have the case orally argued, for the Appellate Court took the motion with the case (R. 46).

At the trial in this proceeding there was no dispute in facts. The trial court thus directed the jury to return a verdict instructing them to find an overcharge of rent in the sum of $1,320. Thereafter the court entered judgment for three times that amount or $3,960 and for $500 attorneys' fees (R. 12).

As to petitioner's statement of subsequent occurrences, respondent amplifies as follows:

1. Petitioner's claim of unconstitutionality of the Emergency Price Control Act was limited to the contention that said Act impaired his right of jury trial contrary to the Constitutions of the United States and the State of Illinois (R. 3, 9, 17).

2. Petitioner did not plead, prove, or even contend that his violation of the Regulations was not willful within the meaning of Section 925(e) so as to limit the judgment to the amount of the overcharge.

3. Contrary to petitioner's assertions at page 5 of the petition, the Supreme Court of Illinois expressly passed upon the points which petitioner says it dismissed without decision or discussion (R. 63-65).

ARGUMENT.

Speaking generally of the six grounds on which the Court is asked to take this case, we assert without need for amplification that none of them falls within the situations contemplated by Subsection 5 of Rule 38 of this Court. We discuss them specifically in the order in which they appear in the petition.

I.

The Question of Unconstitutional Deprivation of the Right of Jury Trial Is Not Before the Court.

The only constitutional point raised and preserved by petitioner is that the Emergency Price Control Act is unconstitutional in that it deprived him of the right of trial by jury in violation of the Seventh Amendment of the Constitution of the United States and of Article II, Section 5 of the Constitution of the State of Illinois (R. 3, 9, 17). If his contention is sound, there is no court, either Federal or State, in which the Act may be so enforced if the defendant demands a jury trial.

Since the Seventh Amendment to the Constitution of the United States is a limitation on the Federal courts and not on the State courts, and since the case at bar was brought and tried in an Illinois court, the Seventh Amendment is wholly inapplicable. *Eilenbecker* v. *Plymouth County*, 134 U. S. 31, 34. This is true even though the suit was brought for the enforcement of a Federal statute. *Minn. & St. Louis R. R.* v. *Bombolis*, 241 U. S. 211, 217, 219. See also: L. R. A. 1917A, 91, 92.

In *Minn. & St. Louis R. R.* v. *Bombolis*, 241 U. S. 211,

this Court, in a suit in a State court under the Federal Employers' Liability Act, affirmed a judgment based on a verdict which was not unanimous but which was legal under the law of the State. In so doing, this Court held that although the Seventh Amendment "exacts a trial by jury according to the course of the common law, that is, by a unanimous verdict", there was no violation of the Seventh Amendment because it did not "apply to the action of the State legislature and to the conduct of the State court in enforcing at the trial the law of the State as to what was necessary to constitute a verdict."

The case of *Dimick* v. *Schiedt,* 293 U. S. 474, 79 L. Ed. 603, relied upon at page 15 of the petition, is beside the point, since the proceedings there reviewed were not brought in a State court but in the United States District Court.

What we have said is a sufficient answer to petitioner's contention that he was deprived of the right to trial by jury contrary to the Seventh Amendment. Petitioner does not here claim that he was deprived of a right to trial by jury contrary to the Illinois Constitution (see Questions Presented, petition page 7). Manifestly, such contention, if made, would not be reviewable on this record because the decisions of the Supreme Court of Illinois are conclusive on the question of what constitutes a trial by jury within the meaning of the Illinois Constitution.

On the merits of that question, however, the Supreme Court of Illinois was correct. As shown by its opinion, it has been held many times that the assessment of damages is not a trial according to the common law and is not within the guarantee of a jury trial provided by the Illinois Constitution, but is a mere inquest of office which may be performed by a sheriff or other officer. Indeed, in that respect the rule in the Federal Courts, under the Seventh Amendment is no different.

Petitioner contends otherwise, and, at page 9 of the petition, relies on *Dimick* v. *Schiedt*, 293 U. S. 474, 79 L. Ed. 603, to support his contention that the Federal courts may not "increase" damages awarded by a jury. In that case, however, this Court merely held that historically the verdict of a jury in a tort suit for unliquidated damages could not be increased by the court, but this Court expressly distinguished between tort actions for unliquidated damages and other actions in which the damages are certain or liquidated. As to the latter, such as in the case at bar, the historical authority of the trial court to increase or abridge the verdict of the jury according to the practices of the common law was expressly recognized in that decision.

Moreover, as said in *Shearer* v. *Porter*, 155 Fed. (2d) 77, at page 81, in reviewing the judgment of a United States District Court:

> "The Seventh Amendment is not a guarantee that such discretionary increasing of compensatory damages as a statute may authorize for exemplary or other public-interest purposes shall be done by a jury. The historic function of a jury is to determine issues of fact. * * * Compensatory damage traditionally is an issue of fact, but the discretionary increasing of such damages is not."

See also: *Teese* v. *Huntingdon*, 64 U. S. 2; *Birdsall* v. *Coolidge*, 93 U. S. 64.

In point of fact, on the record in this case, the trial court did not assess the damages. The jury, as directed by the trial court, brought in a verdict for the amount of the overcharge. The trial court later entered judgment for three times that amount. But even if the trial court "assessed" or "increased" the damages, as petitioner asserts, he was not thereby deprived of his right to a trial by jury as that right existed at common law and as

that right is protected by either the Federal or State Constitution. Under both Federal and State decisions the discretionary increasing of damages never has been a function of a jury and is not within the protection of the constitutional guarantees.

In any event, on the record in this case, there was no question of fact and therefore there could be no deprivation of a jury trial. The amount of the overcharge was not in question. Neither was any other fact. Only questions of law, as to whether there was any overcharge and as to how much the recovery should be, were presented The historical role of a jury is to resolve questions of fact. Thus, in a case where none is presented, there can be no claim of denial of a jury trial.

The disposition by the court of matters involving no question of fact, on the pleadings, or by motion for summary judgment, or for a directed verdict, or otherwise, is not a deprivation of right to trial by jury either under the decisions of this Court or those of the State of Illinois. *Galloway* v. *U. S.*, 63 S. Ct. 1077, 1086; *Lyon* v. *Mutual Benefit Health & Accident Assn.*, 59 S. Ct. 297, 300; *Brady* v. *So. Ry. Co.*, 64 S. Ct. 232, 234; *Fidelity & Deposit Co.* v. *U. S.*, 187 U. S. 315; *Diversey Liquidating Corporation* v. *Neunkirchen*, 370 Ill. 523, 527; 19 N. E. (2d) 363; *Corcoran* v. *City of Chicago*, 373 Ill. 567, 579; 27 N. E. (2d) 451.

We, therefore, respectfully submit that the first reason relied upon by petitioner for allowance of a writ is without merit.

II.

Congress Has the Power to Regulate the Practice in State Courts in Suits for the Enforcement of a Federal Statute, and to Authorize Them to Give Judgment for Three Times the Compensatory Damages Awarded by a Jury.

Under this point we answer petitioner's points VII and VIII.

It is apparent from the opinion of the Illinois Supreme Court that to the extent, if any, which the Emergency Price Control Act purports to enable courts to "assess" damages, it confers no power and establishes no procedure which was not already in effect in the courts of Illinois.

But conceding for the argument petitioner's contention that the statute does provide a new procedure in so far as Illinois is concerned, and that the court rather than the jury did assess the damages, we deny his assertion that the holding by the Supreme Court that Congress may regulate the practice in State courts presents "a Federal question of substance not theretofore determined by this Court." In *Teste and Fleming* v. *Katt,* 330 U. S. 386, 91 L. Ed. 967, 67 S. Ct. 810, this Court held that since the Price Control Act was made under authority of the Federal Constitution, it is part of the supreme law of the land, binding on the judges in every State "anything in the Constitution or laws of any State to the contrary notwithstanding." At page 813 of the Supreme Court Reporter citation, this Court said:

> "that the obligation of States to enforce these Federal laws is not lessened by reason of the form in which they are cast or the remedy which they provide."

And at page 814:

> "When Congress, in the exercise of the power con-

fided to it by the Constitution, adopted that Act, it spoke for all the people and all the States, and thereby established a policy for all. That policy is as much the policy of Connecticut as if the Act had emanated from its own legislature, and should be respected accordingly in the courts of the State."

In *Regan* v. *Kroger Grocer and Baking Co.*, 386 Ill. 284, 299, 54 N. E. (2d) 210, and again in the case at bar, the Supreme Court of Illinois expressly held that Congress has power not only to confer jurisdiction on State courts but to "regulate procedure in State courts in the enforcement of Federal laws." In so doing, it, too, primarily relied upon Article VI of the Federal Constitution and also upon decisions of New York and Wisconsin to the same effect.

It is, therefore, submitted that the power of Congress to regulate the procedure in State courts in proceedings for the enforcement of Federal laws is not open to question.

It is true that the State court in which the action for enforcement is brought must be one of competent jurisdiction. It must have the power to hear and determine cases of the general class to which the action belongs. The Superior Court of Cook County in which the case was tried is one of general and unlimited jurisdiction. It is likewise true that, while Congress may confer jurisdiction on such a court to hear cases for the enforcement of Federal laws, its fundamental powers and jurisdiction, as petitioner contends, are derived from the State Constitution and Statutes.* But this is not to say, as petitioner does, that the *procedure* to be employed in the exer-

* For example: In *Hilgreen* v. *Sherman's Cleaners & Tailors, Inc.*, 38 S. E. (2d) 252, 255, the Supreme Court of North Carolina upheld the jurisdiction of the superior court of that State to entertain such a suit under the Price Enforcement Act although it recently had denied the jurisdiction of a justice of the peace court so to do.

cise of its fundamental jurisdiction may not be prescribed by Congress.

Although, as stated by the Supreme Court of Illinois, petitioner there conceded that jurisdiction of the subject matter is the power to hear and determine cases of the general class to which the action belongs, we submit that petitioner now confuses practice and procedure with fundamental jurisdiction and in his petition treats them interchangeably when he argues that because Congress cannot confer fundamental jurisdiction it cannot prescribe the procedure.

At page 18, petitioner, referring to the Seventh Amendment, says:

> "Under this provision Congress could not authorize Federal courts much less State courts to hear evidence and re-examine facts in jury cases for purposes of assessing damages."

The implication contained in that statement was fully met by this Court in the case of *Minn. & St. Louis Ry. Co.* v. *Bombolis,* 241 U. S. 211, 219, when it stated:

> "The proposition that as the Seventh Amendment is controlling upon Congress, its provisions must therefore be applicable to every right of a Federal character created by Congress and regulate the enforcement of such right, but in substance creates a confusion by which the true significance of the Amendment is obscured. That is, it shuts out of view the fact that the limitations of the Amendment are applicable only to the mode in which power or jurisdiction shall be exercised in tribunals of the United States, and therefore that its terms have no relation whatever to the enforcement of rights in other forums merely because the right enforced is one conferred by the law of the United States. * * *
>
> "* * * Thus, it is urged that if the limitation of the Amendment applies to Congress so as to prevent that body from creating a court and giving it power to act

> free from the restraints of the Amendment, it must also apply, unless the substance is to be disregarded and the shadow be made controlling, to the power of Congress to create a right and leave the power to enforce it in a forum to which the constitutional limitation is not applicable. But this again enlarges the Amendment by causing it not merely to put a limitation upon the power of Congress as to the courts, constitutional or otherwise, which it deems fit to create, but to engraft upon the power of Congress a limitation as to every right of every character and nature which it may create, or, what is equivalent thereto, to cast upon Congress the duty of subjecting every right created by it to a limitation that such right shall not be susceptible of being enforced in any court whatever, whether created by Congress or not, unless the court enforcing the right becomes bound by the restriction which the Amendment establishes."

This Court rejected the contention and affirmed the judgment of the State court of Minnesota based upon a jury verdict which complied with its laws, although it failed to meet the requirements of a valid verdict in the Federal courts.

The above decision also adequately meets the statement at the bottom of page 18 of the petition that the decision of the State court is probably not in accord with Article III, Section 1, of the Federal Constitution:

> "The Judicial Power of the United States shall be vested in one Supreme Court, and in such inferior courts as the Congress may from time to time ordain and establish."

At page 18, the petition asserts that, prior to the Rules of Civil Procedure, the Congress never regulated the practice of the Federal courts, which followed the State practice, and that prior to approval of the Price Control Act it did not attempt to regulate proceedings of State courts. As the Court knows, the Conformity Act had to do only

with pleadings and the rules of evidence and the general conduct of a trial, but was not and is not applicable to the jury procedure itself. The Court also knows that there are many acts of Congress, such as the Wage and Hour Act, which the State courts have concurrent jurisdiction to enforce and in which the increasing by the court of compensatory damages found by a jury, is either discretionary or mandatory.

Day v. *Woodworth,* 54 U. S. 363, and *Denver and Rio Grande Ry.* v. *Harris,* 122 U. S. 597, cited by petitioner at page 19, are of no help, because, first, the question of the right of the court to award exemplary damages was not involved; it was merely held that in certain tort actions, exemplary, as well as mere compensatory damages may be allowed, and therefore that instructions to the jury to that effect were proper; and, second, double or treble damages, such as provided by the Anti-Trust statutes, Wage and Hour laws, Patent laws, and the Price Enforcement Act are by their nature neither compensatory nor exemplary as those terms are employed in the common law.

Indeed, this Court held in *Teese* v. *Huntingdon, et al.,* 64 U. S. 2, in an action for infringement of a patent right, that the jurors are only required to find the actual damages incurred by the plaintiff at the time a suit was brought, and if in the opinion of the court the defendant has not acted in good faith, or has caused unnecessary expenses and injury to the plaintiff, the court may render judgment for a larger sum not exceeding three times the amount of the verdict. See also: *Birdsall* v. *Coolidge,* 93 U. S. 64.

We submit that there is no statute by which Congress has indicated an intention that the matter of multiplying damages should be left to the jury. On the contrary, all of its statutes on patents, trade-marks, wages and hours, the Sherman and Clayton acts, and the Price Control act, impose that duty upon the court.

III.

The Emergency Price Control Act, as Amended, and the Regulations Made Pursuant to the Authority Thereof, Gave Respondent the Right to Withhold Possession of the Premises After Expiration of the Lease so Long as He Tendered the Rent.

It is true, as stated in petitioner's point IX, that the Act provides that nothing therein contained shall be construed to require him to offer accommodations for rent.

It is equally true, however, that the Act provides for an administrator and, in Sections 902(b) and (d) U. S. C. A., permits the issuance of regulations concerning rents and evictions, and, in 924 (d) U. S. C. A., provides that no court except a special tribunal, to be known as the Emergency Court of Appeals, shall have power to consider the validity of any regulations.

The Administrator issued the Rent Regulations for Housing, which at all times in question were in effect in Chicago. Sections 2(a) and 4(a) prohibited the demand or receipt of rent for use or occupancy of housing accommodations after July 1, 1942, higher than the rent thereof on March 1, 1942, regardless of any lease or other agreement. Section 6 extensively regulates the removal or eviction of tenants. Section 6(a) prohibited the removal or eviction of a tenant, notwithstanding the expiration of his lease, so long as he pays the rent to which his landlord is entitled, except in certain specified cases not involved in the case at bar; and Section 6(b) requires that before proceeding in any other case the landlord must obtain the Administrator's approval by receiving an O. P. A. certificate or order. This regulation applies to any case in which the landlord wishes to withdraw the premises from the rental market.

The validity of Section 6(b) of the Regulations, as applied to cases in which the landlord no longer desires to offer accommodations for rent, has been upheld by the Emergency Court of Appeals in *Taylor* v. *Bowles,* 145 Fed. (2d) 833, 834; *Taylor* v. *Porter,* 156 Fed. (2d) 805, 810; and *Taylor* v. *Bowles,* 147 Fed. (2d) 824, 831.

The Emergency Court of Appeals, in holding said Regulation not to be in conflict with Section 4(d) of the Act, because the landlord on a proper showing might obtain an eviction certificate, said, in *Taylor* v. *Bowles,* 145 F. (2d) 833, at page 834:

> "However, the rent regulation from its first issuance has contained restrictions on eviction in the interest of affording tenants a measure of security. See Section 1388.1806, 7 F. R. 4915. * * * except in a few specified situations, it is provided that the landlord must first obtain authorization from the Office of Price Administration before proceeding to evict a tenant. Originally, one of the situations in which eviction was permitted without prior administrative authorization was where 'the landlord seeks in good faith not to offer the housing accommodations for rent.' Evidently this worked out unsatisfactorily, for a tenant, served with such an eviction notice, would not know whether he was obliged to comply with it or not, in the absence of a conclusive determination of fact as to whether the landlord had the *bona fide* intention of withdrawing the accommodations from the rental market. The regulation was therefore amended, effective October 20, 1942, by Supplementary Amendment No. 7 (7 F. R. 8505), so that a landlord wishing to withdraw his housing accommodations from the market could no longer proceed to evict his tenants without prior authorization by the Office of Price Administration. But the regulation as so amended does not conflict with Section 4(d) of the Act, for such a landlord upon a proper showing may obtain an eviction certificate from the Area Rent Director."

Petitioner did not and does not contend that under the Regulations, respondent was in any way at fault so as to enable petitioner to regain possession without an O. P. A. certificate. Indeed, the record shows that month after month respondent paid or tendered the maximum rent and thus kept himself within the coverage provided by the Regulations, that is to say, he had the right to continue in possession. Petitioner says that he wished to withdraw the premises from the rental market, but he concedes that he never obtained a certificate or order authorizing him so to do as required by the Regulations (R. 22). It follows that respondent's retention of possession was lawful and that the validity of the Regulation, so passed upon by the Emergency Court of Appeals, is not open to the question which he seeks to raise by his point IX.

Even if, under the Act, the question of the validity of the Regulations were open, the case of *Bowles* v. *Willingham*, 321 U. S. 503, 64 S. Ct. 641, is not in point, because it has to do merely with a suit for injunction to restrain violations of the Regulations. It did not involve removal of accommodations from the rental market and did not consider the proper procedure therefor. In that case, at 64 S. Ct. 648, the Court merely observed parenthetically:

> "We are not dealing here with a situation which involves a taking of property. *Wilson* v. *Brown, supra.* By Section 4(d) of the Act it is provided that 'Nothing in this Act shall be construed to require any person to sell any commodity or to offer any accommodation for rent.' There is no requirement that the apartment in question be used for purposes *which bring them under the Act.*" (Italics ours.)

It is true, of course, that nothing contained in the Price Control Act compels an owner to bring the property under the Act by renting it in the first instance, but it is certainly true that if an owner elects to rent his property

and thus to bring it under the Act, as petitioner did, it thereupon becomes subject to all of the Regulations.

It is, therefore, manifest that respondent's continued possession of the premises after the expiration of his lease was not unlawful as petitioner contends, and that the Illinois Supreme Court was correct in holding that the Act and the Regulations were designed and expressly intended, among other things "to freeze" the occupancy of premises in controlled areas and "that the landlord here was in the company of thousands of others who had tenants who could lawfully occupy as long as they paid the rent" (R. 64).

IV.

Respondent Paid an Overcharge of Rent for the Use and Occupancy of Residential Property. Such Use and Occupancy Was Not in the Course of Any Trade or Business. Accordingly, Respondent May Recover Even if Such Payment Was Made Knowingly and Without Compulsion and Regardless of His Motives. The Offense Lies in the Landlord Demanding or Receiving More Than the Maximum Rent. It Is Not a Violation for the Tenant to Pay More Than the Ceiling.

Under this point we answer petitioner's points X and XI.

At the outset, we wish to suggest that an effective rent control program cannot exist if a landlord can decide not to renew a lease and thereafter collect, under the guise of damages or otherwise, more than the legal maximum rent otherwise allowable. Yet, this is in substance what petitioner did.

As we have shown in the preceding point, respondent's retention of possession was lawful. He, therefore, owed petitioner but $125.00 per month. Petitioner, nevertheless,

demanded and received from respondent $2,320.00, which was $1,320.00 in excess of the maximum for the period possession was retained. Accordingly, contrary to the Act and to the Regulations, petitioner demanded and received as rent for the use and occupancy of residential premises an overcharge of $1,320.00, and that is all that is required to support respondent's action and judgment.

Throughout the proceedings below, but not in this Court, petitioner strenuously contended that he had demanded and received the $2,320.00, not for rent, but as liquidated damages under the provisions of the lease. The Supreme Court of Illinois held that respondent was "a tenant against the will of the landlord by reason of the provisions of the statute" and that it made no difference under the Act what the payment was called, since "rent" is defined "as the consideration demanded or received in connection with the use or occupancy of any housing accommodations". It further held the said provision of the lease to be inconsistent with the Regulation "that the same rent be charged for the overtime as that regularly reserved", and consequently ineffective. It said it would be a mere play upon words to say that the payment was for liquidated damages, when the "daily amount accrues from use or occupation" as it did under the void lease provision relied upon by petitioner.

Petitioner here renews his contention that the payment was made for profit and thus in the course of trade or business. Petitioner, however, overlooks the fact that the statute provides merely that a person who buys a commodity for use and consumption, other than in the course of trade or business, may bring such an action. It expressly makes the payment or receipt of rent the buying or selling of a commodity. When a tenant pays rent for premises used as a home and not for a business, he may maintain an action whatever other motive he may have had, and that is what respondent did.

The circumstance that payment was not made until six months after possession had been surrendered, does not alter the fact that it was made for use and occupancy of residential premises. The record shows that the occasion for making it at that time, after all prior tenders of ceiling rent had been refused, was that petitioner had just filed his brief on an appeal from an order of the lower court denying him recovery under the lease provision for liquidated damages, and it was hoped that further expense of that appeal to respondent could be avoided. Neither the Act nor the Regulations limit recovery to overcharges paid during the tenant's actual possession. The Emergency Price Control Act, as amended, 50 U. S. C. A. App. Sec. 942(g), Rent Regulations for Housing, as amended, 10 F. R. 13528 Sec. 13(a) (10).

The facts which led to the overpayment, omitted in the petition, but which we have supplied, show that the overpayment was made under pressure of petitioner's unlawful and aggressive demands and for the purpose of stopping or minimizing the expenses to which respondent was thereby being subjected through numerous proceedings brought by petitioner as part of his campaign to get excess rent and possession in utter defiance of the Act and Regulations.

Recovery under the Act and the Regulations is not limited to cases in which an overcharge is paid under duress. If recovery were so limited, the objectives of the Act would seldom be attained. If, however, duress be a condition to recovery, then it existed on the facts at bar.

Neither motive, nor knowledge by the tenant that the payment is excessive, is material under the public policy of this Act. In holding motive to be immaterial, the Supreme Court of Illinois was merely following the great weight of existing authority on the point, including the following cited in respondent's briefs in that court: *Kenny*

v. *Hood* (1946 C. C. A.), 158 Fed. (2d) 226 (even though the sale was the result of plaintiff's fraud or of mutual mistake); *Gilbert* v. *Thierry*, 58 F. Supp. 235 (affirmed in 147 Fed. (2d) 603 (C. C. A. 1) (recovery had even though landlord acted innocently, tendered restitution and recovery might give a "windfall to persons with malevolent or disagreeable motives"); *Porter* v. *Crawford & Dougherty Foundry Co.*, 154 Fed. (2d) 431, 434 (C. C. A. 9) (recovery affirmed even though purchaser "joyfully may have aided the seller in violating the law"); *Zwang, et al.* v. *A. & P. Food Stores*, 46 N. Y. S. (2d) 747 (notwithstanding the general "judicial aversion to aiding a malefactor in the profiting from his own wrong" since "the consumer-purchaser commits no offense * * * when he pays an excessive price"); *Bowles* v. *Indianapolis Glove Co.*, 150 Fed. (2d) 597, 601 (C. C. A. 7) (although seller acted in reliance on conduct of the Administrator inducing sales at prices charged); *Beasley* v. *Gottlieb*, 42 A. (2d) 305 (N. J.) (notwithstanding seller's subsequent tender of return of the excess price); *Schaubach* v. *Anderson*, 36 S. E. (2d) 539 (Va.) (notwithstanding tenant knew that he was paying above ceiling rental); *Maitland* v. *Krieger*, 2 P. C. Para. 51858 (N. J. Court of Common Pleas, Essex County, Jan. 12, 1944) (although the amount was in dispute at the time of payment); *Greer* v. *Sims*, 1 P. C. Para. 51938 (Calif. Justice Court) (although tenant knowingly agreed to overpay, since it is the duty of court to enforce "though not in agreement or accord with many of the so-called 'emergency' laws"); *Bowles* v. *Leventhal*, 61 F. Supp. 144, 147 (N. Y.) (although sale actually rescinded); and *Bowles* v. *Hall*, 62 F. Supp. 486, 487 (Ky.) (although agreed if price thereafter found to exceed maximum, seller would refund overcharge).

In opposition to the foregoing authorities, petitioner cited the cases of *Trapp* v. *Great A. & P. Tea Co.*, 21 N. J.

Misc. 205, 32 Atl. (2d) 717; *Dunakin* v. *S. W. Co-op Assn.*, N. M. 69, 157 Pac. (2d) 243; and *Lightbody* v. *Russell*, 45 N. Y. S. (2d) 15, 293 N. Y. 492, which he relies on here. Even if those cases were in conflict with the authorities cited by respondent, the latter authorities would control because of their overwhelming weight. Actually, however, they are not in conflict.

In *Trapp* v. *Great A. & P. Tea Co.*, 32 Atl. (2d) 717, the Camden City District Court permitted recovery on the first purchase although the purchaser knowingly paid more than the ceiling since it was for her own use or consumption, but denied recovery on the two subsequent purchases which were not.

In *Dunakin* v. *S. W. Co-op Assn.*, 157 Pac. (2d) 243, the court exhaustively examined the evidence and came to the factual conclusion that the purchase involved was not for use and consumption.

In citing *Lightbody* v. *Russell*, 45 N. Y. S. (2d) 15, petitioner overlooked an intervening appeal to the Supreme Court Appellate Division (47 N. Y. S. (2d) 11) in which the court said at page 12:

> "The second defense that the plaintiff cooperated to violate the statutes and regulations in respect of ceiling prices of the tractor here involved and to induce the defendant to violate the same, is insufficient in law. * * * The plaintiffs may not under the present pleadings be deemed to be in *pari delicto* with the defendant and for that reason barred from invoking the right given by the statute to sue for treble damages."

It is no offense under the Act and Regulations to pay more than the ceiling. The offense is to demand or receive more. But there is no need or occasion for respondent to rely upon the letter of the law to sustain his judgment. It was not he who initiated the events which led

to the overpayment. For a limited time, until he could gain possession of the new home which he had purchased, he was lawfully retaining possession of petitioner's premises, only to be confronted with a barrage of actions initiated by petitioner, each of which, although successfully defended, caused expense, anxiety and concern. Even then, respondent did not attempt to entrap petitioner, nor in any way to lull him. On the contrary, when he did pay the overcharge claimed for the use and occupation of the premises as his home, he told petitioner that he would sue him, and petitioner clearly understood what he was told. Thus, respondent satisfied all ethical and equitable considerations, if they be in any way material. Before petitioner took the money he had been informed, through cases cited by respondent, that his lease provision for so-called liquidated damages was void, but his attitude was that they just couldn't do that to him, and he was determined to get the money, Act and Regulations to the contrary notwithstanding.

Conclusion.

The Supreme Court of Illinois was confronted with the important question as to whether the courts of this State are open for enforcement of Federal laws of the type at bar. It had to decide, too, whether the public policy declared by the Price Enforcement laws was to be recognized and enforced in this jurisdiction. We submit, that its decision gives full effect to the Law of the Land and that the petition for a writ of certiorari should be denied.

Respectfully submitted,

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CHARLES ELMORE CROPLEY
CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1949.

No. 228

WILLIAM R. BROWN,
Petitioner,

VS.

VINCENT O'BRIEN,
Respondent.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ILLINOIS.

REPLY BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI.

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MAY IT PLEASE THE COURT:

We shall reply briefly to respondent's brief.

I.

The question of constitutionality of the Emergency Price Control Act is before this court.

At page 6 of the petition we said the validity of the Act is in question as denying the right of trial by jury. This question was raised by the answer (page 4 of Petition).

Respondent relies chiefly on *Minn. & St. Louis Ry. Co.* v. *Bombolis,* 241 U. S. 211, 219, in arguing that the Seventh Amendment does not apply to trials in State courts. This case did not involve an act of congress denying the right of trial by jury. The language quoted by respondent, page 13, clearly shows that the Seventh Amendment is a limitation on the power of congress to deny trial by jury.

This case shows that the act, see page 12 of petition, does violate the Seventh Amendment in denying a trial by jury in any court, either Federal or State.

It is the constitutionality of the act of congress that is before the court on this petition. The State courts held it did not violate the Seventh Amendment. This holding is in conflict with the decision of this court in *Dimick* v. *Scheidt,* 293 U. S. 474, 79 L. Ed. 603, 611.

There is no State statute in Illinois authorizing or empowering the State courts to enter judgments in jury cases in excess of the verdict or to weigh the facts and assess the damages. The question before the court is the constitutionality of the Act of Congress.

The case of *Shearer* v. *Porter,* 155 Fed. 2d 77, is another case that is in conflict with *Dimick* v. *Scheidt,* 293 U. S. 474.

II.

Respondent's second point is that Congress can regulate the practice in State courts.

Here again respondent relies chiefly on *Minn. & St. Louis Ry. Co.* v. *Bombolis*, 241 U. S. 211, 219, but the language quoted by respondent, pages 12, 13, shows that the statute there before the court was a state statute and the court held that the Seventh Amendment was not applicable to state statutes. At the same time the court points out that the Seventh Amendment is binding on Congress so it shows the Price Control Act is unconstitutional and therefore void and does not authorize any court to enter judgment for any amount.

This case held that the practice as to jury trials in state courts is to be regulated by the states and not by Congress.

III.

Respondent's Points III and IV is in reply to petitioner's Points IX, X and XI.

Respondent's claim is that because he occupied the premises as a home his payment of liquidated damages after surrender of the premises was not in the course of business.

He does not and cannot deny that he made the payment in the expectation of gain or profit.

Under the act, see pages 12, 13 of petition, it is the payment of rent that is the sale of a commodity, not the use of the premises. The payment was made for the sole purpose of gain and therefore in the course of business and only the administrator could bring suit for and on behalf of the United States.

Respondent presents no reasons or argument to show why the writ should not issue on these points. He shows by the conflict in authorities that the writ should issue to settle these questions which have not been heretofore before this court.

Conclusion.

For the reasons set forth in the Petition and Brief and in this Reply Brief Petitioner urges that the Writ of Certiorari prayed in the petition be granted to settle these important questions not heretofore decided by this Honorable Court.

Respectfully submitted,

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Attorney for Petitioner.